Supreme Court, U.S.
FILED
MAY 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1935

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ISAAC JOHNSON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Eighth District Court of Appeals
For Cuyahoga County, Ohio

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QUESTIONS PRESENTED

I

Whether due process is denied when a trial court in denying a "Motion to Suppress" does so under circumstances which show the court failed, and refused, to reckon with various indisputable principles that distill from the Franks v. Delaware and United States v. Leon decisions.

II

Whether due process was violated when the trial court in ruling on a Motion to Suppress refused to state his essential findings on the Record under circumstances which allowed a reviewing court to articulate an artificial basis for vindicating such refusal.

III

Whether due process is denied when the reviewing court arrogates to itself the power to arbitrarily classify obviously fact-bound, or fact-based, issues as having raised only questions of law, which the court then declares not only relieved the trial court of any duty to state its essential findings on the Record, but also empowered them [A] to impute to the trial judge any factual or legal theory that could be divined from the Record and [B] to regard the same as the basis for the trial court's original decision.

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For Cuyahoga County, Ohio

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Isaac Johnson, respectfully prays that a Writ of Certiorari issue to review the judgment of the Eighth District Court of Appeals, which judgment became final on March 12, 1986 when the Supreme Court of Ohio denied further appellate review.

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved in this case are:

(1) Fourth Amendment, United States Constitution.

(2) Fourteenth Amendment, United States Constitution.

(3) Revised Code of Ohio, §2923.13.

(4) Revised Code of Ohio, §2923.14.

(5) Rule 12 (e), Ohio Rules of Criminal Procedure.

(6) Rule 104, Ohio Rules of Evidence.

OPINIONS BELOW

The judgment entry by the Supreme Court of Ohio denying further review is set forth at Appendix "A" in the Appendix to this Petition, at page A1.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "B", at page A2.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on March 12, 1986. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257 (3).

STATEMENT OF THE CASE [1/]

Isaac Johnson, the petitioner herein, was convicted and sentenced on the charge of Possession of Criminal Tools in violation of R.C. of Ohio, §2923.24 and Having a Weapon Under Disability, R.C. of Ohio, §2923.13. The appeal on questions of law from the final judgment entered by the trial court resulted in an affirmance. The Court's Journal Entry and Opinion is attached here as Appendix "B". By this Petition Isaac Johnson contends the constitutional issues are substantial and should be reviewed.

I

The original indictment charged our petitioner (also referred to herein as

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1/ References to the transcript of proceedings will be designated by the prefix "R". References to the Opinion rendered in the Ohio Court of Appeals will be to our Appendix and will be cited as A-(page).

"Ike Johnson") with a drug offense, possession of gambling devices or criminal tools and a weapon offense. The facts, which were fully developed during several pretrial hearings on the Motion to Suppress, showed that based on the affidavit of Detective Steve Pillar a search warrant was issued to search Johnson's home for a virtual laundry list of property the affiant swore could be located on the premises. Petitioner specifically alleged that the affidavit contained statements that were not only false, but deliberately so. Other statements were alleged to have been made with a disregard for the truth or were otherwise wilfully deceptive and misleading.

The above very serious allegations and accusations were supported by a tender to the Court of a taped interview conducted by counsel with the informant, Mary Stewart, and her affidavit. Also, Mary Stewart testified. Her evidence (which appears in Vol. 2 of the Transcripts, pp. 20-35) showed she had been arrested for stealing and was confined in the Cleveland Heights jail

(id., 20-21 & 23-24). Additionally she revealed one of the officers actually gave her drugs to use (id., 25-26). And, they gave her some wine (id., 30). Her evidence further verified that despite the categorical references to her as a "reliable informant", she had never played an informant role before. And, most assuredly she was unknown to these officers (Id., 25-26). None of this evidence was confuted.

By her own admission Mary Stewart's desire was to fully extricate herself from the theft charges she and her partner then faced, so she decided to frame Ike Johnson (id., 27 & 59-60). With this thought in mind she made several calls to his home (id., 28) and to a local bar that he frequented (id., 38). Eventually, she and Johnson agreed to meet at his home.

Disputing and confuting various essential allegations in the affidavit, Mary Stewart testified she was not thoroughly searched (id., 29) and that the cocaine she had secreted in her vagina was neither looked for, nor located (id., 29). (The fact that she

was not thoroughly searched was later verified by the policewoman who admitted she did not look into Mary Stewart's vagina [Vol. 3, Transcript, pp. 30, 35-38].) Once inside the home, she encountered Johnson and others and engaged them in routine conversations. Before returning to the police car, Mary Stewart removed the cocaine from her interior and put the money she had been provided by the police in its place (Vol. 2, Transcript, p. 31). Shortly afterwards, she and her theft partner were released from custody. She further added that at no time after leaving Johnson's house was she searched (id., 32-33), thus specifically disputing still another critical statement in the affidavit.

Most significant here, contrary to his own affidavit, Detective Pillar testified that Mary Stewart was not a reliable informant (Vol. 3, Transcript, pp. 20 to 35). Also, contrary to his own affidavit, Pillar's evidence showed he first met Mary Stewart after she was arrested. Indeed, as Pillar saw it,

he intentionally made these various false reliability statements to conceal Mary Stewart's identity (id., 62). The fact that the Court, in issuing the warrant, would necessarily credit these sworn to misrepresentations as being true apparently had to have occurred to this Officer. Or he deemed it an irrelevant circumstance, which seems a most unlikely thing for a seventeen (17) year police veteran (id., 62) to believe. (Cf., Appendix "B", infra, at p. 2.)

II

In arguments made to the trial court, counsel easily demonstrated that the affiant had falsely referred to Mary Stewart twelve (12) times in his affidavit as a "reliable informant" (id., 40). Based on this fact, the following point was then made to the Court:

> "Now I have to believe that ... [the] sole purpose of that allegation was to persuade the Court to issue this warrant ... [because] they were aware to some extent that their evidence was insufficient" (Ibid).

The State's rather nebulous argument in response translated into the contention that whether Mary Stewart was a reliable informant was really irrelevant (Id., 48).

In any event, it happened that the Court later issued it's Order which stated "Motion to Suppress over-ruled".

III

This case was ultimately resolved by the trial court on the basis of a stipulation that the facts on the merits would be consistent with the evidence presented during several pretrial hearings. (See Vol. I, Transcript, pp. 24-24.) The Court then proceeded to find Johnson guilty of the criminal tools and weapon charge. In finding the accused not guilty of the drug charge, the trial Court indicated he was of the opinion Mary Stewart "was not thoroughly searched before ... [she was sent into] ... the home on Northvale, and the alleged company of Mr. Johnson." 2/ As the Court

2/ The appellate Court chose to ignore the compelling impact of this "factual finding". This they did by making the completely opposite finding (Appendix "B", p. A17) as one of the major premises in its flawed syllogisms. (Ibid.)

saw it, the evidence could not support a conviction on the drug charge. (Id., 25.)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

No one can deny that the sole purpose of the Franks' aspect of the evidentiary hearing granted herein was to give the Court the opportunity to resolve the various issues of fact raised by the contentions made in our Motion to Suppress. This Motion was supported by evidence showing the affiant resorted to intentional falsehoods and misrepresentations, and otherwise proceeded with an easily demonstrated reckless disregard for the truth.

Here too, it seems clear enough that not unlike the Federal Rules, our Rules (Rule 12 [e], Ohio Rules of Procedure) likewise "permit [a] factual hearing prior to trial ... to resolve issues of fact peculiar to the Motion" (United States v. Covington, 395 U.S. 57, 60 [1969]). This procedure is also allied to that required by Leon for the resolution of the factual disputes involved. So postured, the evidentiary Record that was before our Court of

Appeals simply fails to support the conclusion that the only questions resolved by the trial Judge were questions of law. And, for that reason the trial Judge below could avoid with impunity the mandate that his essential findings must be stated on the Record. Simply put, as our Court sees it, even the credibility of the various witnesses who testified and the resolution of the serious conflicts generated thereby involved only questions of law.

ARGUMENT NO. I

Due Process Is Denied When A Trial Court In Denying A "Motion To Suppress" Does So Under Circumstances Which Show The Court Failed, And Refused, To Reckon With Various Indisputable Principles That Distill From The Franks v. Delaware and United States v. Leon Decisions.

It is here being contended that the Court of Appeals indefensibly refused to take note of certain critical facts. In addition to the indisputably false

statements in the affidavit (e.g., concerning the informant's reliability and the alleged strip searches), the Court failed to reckon with the value in the warrant process of the magistrate's informed determination which was wilfully undermined by the nondisclosure of certain material facts. These included the circumstances concerning the informant's arrest status, the deal she made with the police, and their knowledge of her addict status, which they accomodated by giving her drugs and wine. All this validates the contention that, in the wake of these circumstances, the court issuing the warrant was deprived of information essential to any meaningful assessment of the informant's reliability and credibility.

(a) Where the indisputable facts show a search warrant affidavit contains information the affiant knew was false and other allegations which were made with a reckless disregard for the

> truth, any court reviewing its sufficiency must make a critical determination as to whether the issuing court was "misled".

Given the unassailable and easily verifiable facts in this cause, it is an inescapable conclusion that the Court which issued the search warrant perforce had to have been misled by the indisputably false statements in the affidavit. This follows, although as the prosecutor will surely argue, the affiant really did not intend for the issuing Court to rely on such things as his sworn statement that Mary Stewart was "a reliable informant." Simply put this Court will be asked to close its eyes, as our Court of Appeals did, to the reality involved in the irrepressible fact that Mary Stewart was falsely referred to as a "reliable informant" no less than twelve (12) times in a two (2) page affidavit.

While we surely know what intentional lies are, the concept of "reckless disregard of the truth"

although referred to in Franks as an alternative possibility, was not defined by the Court. On the other hand, one Court in dealing with this phrase resorted to an analogy drawn from the libel cases. See, United State v. Davis, 617 F.2d 677 (D.C. Cir. 1979). In Davis the Court reasoned that what had to be proved was that the affiant "in fact entertained serious doubts as to the truth of his [allegations]" (id., 617 F.2d at 694, citing St. Amant v. Thompson, 390 U.S. 727, 731 [1968]). In the context of this case, we contend it is a reasonable inference that the affiant here (Detective Pillar) also acted with a "reckless disregard of the truth."

Significantly, in this case Mary Stewart was not searched. And she revealed being under arrest for stealing and being furnished drugs and liquor by the police. (Vol. 2, Transcript, p. 20, et. seq.)

This brings us to the Appellate Court's arbitrary rejection of the idea that the Franks rationale applies full strength to wilful omissions. See United

States v. Leftkowitz, 618 F.2d 1313, 1317 (9th Cir. 1980). The upshot of this latter contention is that where (as here) it is shown that information was deliberately withheld for the purpose of deception, or was recklessly done for untruthful purposes, any probable cause determination made in connection with the issuance of the warrant is sufficiently underminded to call for the suppression of any property seized on the basis thereof.

The bottom line here is that the idea expressed by this Court in United States v. Ventresca, 380 U.S. 102 (1965), that search warrant affidavits "are to be tested and interpreted ... in a commonsense and realistic fashion" rightly should cut both ways. Because it does so, those applying for warrants should realize the logical impact of what they represent as facts on the Court's decision to authorize the search solely on the basis of their oath. This analysis leads inexorably to the conclusion that the affiant was also reckless with his disregard of the truth.

This same logic can be extended to include our contention that the deliberate omission from the affidavit of any indication showing the circumstance under which Mary Stewart was prevailed upon by the police and otherwise coerced, into making the effort to victimize Ike Johnson, was a wilfully calculated effort to deceive the Court that issued the warrant.

Also, and this point should be weighted heavily against the opinion rendered by the Court below, we cited to that Court the case of United States v. Rule, 594 F. Supp. 1223 (D.C. Me. 1984). Yet, in its rush toward judgment, which apparently also compelled it to summarily deny a Rehearing application, the Court seemed quite content in failing to address the wilful omission issue.

(b) The Court failed to weight the compelling fact that the officers here involved had "no reasonable basis for believing the warrant was properly issued" (Leon, 3421).

Any question as to whether the affiant believed the warrant in this case was properly issued has a very ready response. He certainly believed it was properly issued if he also believed that, as a police officer, he was entitled to absolution for his mendacity when it was resorted to as a tactic in the war on crime. But, of course, this can hardly be the case. For regardless of how parsimonious our Court's approach to Fourth Amendment rights may be, it is a very bold step for any Court to openly sanction, and refuse to condemn, perjury simply because it was committed by a police officer. See e.g., State v. Dodson, 43 Ohio App. 2d 31 (1974) and State v. Hunt, 22 Ohio App. 3d 43 (1984).

We do concede that our local Courts are especially sensitive to the public's demand that more must be done to combat crime. And, just as surely, they seem prone to ignore what some of us know to be true -- that in these situations the temptation is really great in favor of addressing this public clamor by suppressing the fact that our Fourth Amendment rights "are not mere second

class rights but belong in the catalogue of indispensible freedoms," Brinegar v. United States, 333 U.S. 160, 180 (1949), and once loss will be most difficult to recover.

So postured, as we read Leon this Court fully intended that even the "good faith" standard adopted by them in warrant situations "requires officers to have a reasonable knowledge of what the law prohibits" (Leon, 104 S. Ct. at 3420 n. 20). This very point was punctuated by the reference to the conduct expected of "a reasonably well trained officer" (id., at 3421 n. 23 & 3422). What this does is put Officer Pillar's subjective belief that it was necessary to lie in his affidavit outside even the "good faith" exception to the exclusionary rule. This latter point was emphasized by the Court's specific reference to Beck v. Ohio, 379 U.S. 83 (1964), for the quote that "if subjective good faith alone was the test, the protections of the Fourth Amendment would evaporate and the people would be secure in their persons, houses, papers and effects only in the discretion of the police," Leon,

104 S. Ct. 3417 n. 13 (citing Beck, 379 U.S. at 97).

Of course it can only be with tongue-in-cheek that the State would again contend these officers acted in good faith. This follows because the paradox of any such position would really be too evident. Simply put, it is one thing to make a search in reliance on a warrant that was obtained on the basis of a valid and sincere effort to comply with the law. It is another thing, where the effort to obtain a warrant was an outgrowth of a situation such as we have here, where an addict-informant openly sought to frame an unsuspecting friend of hers and the veteran officers involved did not take even normal precautions to insure against what occurred here. See, United States v. Kinnard, 465 F.2d 566, 570-571 (D.C. Cir. 1972). In Kinnard, it was fully recognized that drug addicts in custody have a tendency to tell the police just what they want to hear. Also see United States v. Hoppe, 645 F.2d 630, 633 (8th Cir. 1981).

(c) The Court failed to credit the tenet that

> "suppression is appropriate ... [where] the officers were dishonest or reckless in preparing their affidavit ...." (Leon, at 3423).

As a direct consequence of the Leon decision, we also contended in the Courts below that the applicability of the exclusionary rule must be regarded as a question separate and apart from that of whether Fourth Amendment rights were violated. Dishonesty in the affidavit (as surely was the case here) or recklessness with regard to the truth (also the case here) it was argued, make for a situation where suppression is required. This was said to be so even if there was a finding that the misrepresentations or omissions, under Franks v. Delaware, could be deemed immaterial. In our view, as specifically argued elsewhere in this Petition and as was argued to the Courts below, no other interpretation of Leon on this point is even possible.

This is so because given a finding that the affiant was dishonest, or only reckless with the truth, there can be no objective good faith reliance on the validity of the warrant. Leon, 104 S. Ct. at 3420 n. 20. Stated another way, if a law enforcement officer actually relies on the validity of the warrant and that reliance was objectively reasonable, suppression is not necessarily required. This is so even if the warrant is defective. Id., 104 S. Ct. at 3421. However, suppression is most appropriate where, as here, the "officers were dishonest or reckless in preparing their affidavit" (Ibid).

Since the arguments made above show beyond any possible dispute the extent to which the affiant tortured the truth in various critical areas, the required conclusion simply cannot be avoided. This follows unless our Courts can be allowed to abandon entirely their obligations to review applications on the basis of which search warrants are issued and their concomitant responsibility of deterring unreasonable searches by the police.

On this point, we again rely on Leon (id., 3420 n. 20) for an analysis which conflicts with the major thrust of our Court's decisions in State v. Dodson, 43 Ohio App. 2d 41 (1974) and State v. Hunt, 22 Ohio App. 3d 43 (1984). As we read Leon, once a Court charged with reviewing a search warrant affidavit agrees the affiant was dishonest (as surely he was here) or reckless with regard to the truth (also the case here) suppression is required. This is so regardless even of a finding that the intentional misrepresentations or omissions, under Franks v. Delaware, could be deemed immaterial. In our view, as argued above, no other interpretation of Leon on this point is even possible.

ARGUMENT NO. II

It Is A Due Process Violation When The Trial Court In Ruling On A Motion To Suppress Refuses To State His Essential Findings On The Record, Which Violation Is Compounded When A Reviewing Court Articulates

An Artificial Basis For Vindicating Such Refusal.

The requirements of Rule 12 (e), Ohio Rules of Criminal Procedure, impose a mandatory duty on Ohio trial judges to articulate their essential findings when resolving issues raised by pre-trial motions. Also see, Rule 104, Ohio Rules of Evidence. Obviously this should be done in a way that sufficiently demonstrates not only that the determinative issues were isolated but that they were dealt with in an informed way on the basis of fundamental criteria.

The reason this is so vitally important is because the reliability of any court's determinations with reference to dispositive legal issues is always a matter of utmost importance. This is particularly so in areas where the contention is made that constitutional rights have been violated. Indeed, it can hardly be denied that to be reliable any legal determination made in the context here being referred to should not only be the product of guided procedures but of reasoned judgment.

In this appeal we are concerned with the trial court's summary rulings made with reference to the appellant's Motion to Suppress and with reference to the request for the return of certain property before and after trial. Here, the Record shows the Court, as is the practice of most of the trial judges in our county, intentionally concealed the basis for its ruling denying the Motion to Suppress. Cf., United States v. Barletta, 644 F. 2d 50 (4th Cir. 1981). In Barletta, the Court articulated the idea that a party could, on the basis of Rule 12 (e) Federal Rules of Criminal Procedure, compel the Court to "set forth specific grounds supporting a finding" made in connection with a comparable pre-trial motion. Since our Motion specifically sought the findings required by Rule 12 (e), and counsel specifically requested the Court to articulate his findings on the Record in taking exceptions to the Court's conclusory and summary ruling, the Court's failure to do so is magnified into a due process violation.

Here the facts also show the defense not only asked the Court to make specific findings on the relevant issues, counsel also complained in writing that the trial court had not articulated any basis for the required resolution of the isolatable issues that had to be decided.

Simply put, what was absolutely required of the trial court was a statement or explanation of the factors which the Court determined mandated his denial of the Motion. Stated another way, since the property sought by his Motion to be excluded and returned was on based on constitutional grounds, the movant was entitled to some expression reviewing the factors or detailing the evidence on which the indicated conclusion or conclusions were based. And, this should be done with "unmistakable clarity." See, Sims v. Georgia, 385 U.S. 538 (1967).

The cogency of the above point is magnified by the fact that in many of these areas there is really no assurance that merely because the ultimate fact-finder carries the title "Judge", this somehow makes him, or her,

conversant with any or all of the complicated tenets in this particular area of the law. And, just as surely it does not follow that all Judges are appropriately informed to an extent that we can naturally assume they did the right thing.

ARGUMENT NO. III

Due Process Is Denied When The Reviewing Court Arrogates To Itself The Power To Arbitrarily Classify Obviously Fact-Bound, Or Fact-Based, Issues As Having Raised Only Questions Of Law, Which The Court Then Declared Not Only Relieved The Trial Court Of Any Duty To State Its Essential Findings On The Record, But Also Empowered Them [A] To Impute To The Trial Judge Any Factual Or Legal Theory That Could Be Divined From The Record And [B] To Regard The Same As The Basis For The Trial Court's Original Decision.

As to the Appellate Court's major premise that the credibility issues necessary to any meaningful resolution of the Motion To Suppress raised only questions of law, we contend this holding by the Court is absolutely wrong. Also, it should be noted the State did not argue this theory to the Appeals Court, which emphasizes the fact that counsel was only notified of this post hoc rationale when he received the Court's Opinion. Thus, our only opportunity to specifically address this far-fetched theory was in our Motion for Reconsideration, which was summarily denied.

In further contexting the issues raised by the above Argument, our position is that the questions here involved are fundamentally the same as the question of voluntariness of a consent to a search, Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973), or of a confession, Sims v. Georgia, supra. Certainly a finding of voluntariness in these connections is no less based on the fact-finder's resolution of any factual disputes than would be the issues here as

to: (1) whether the affidavit contained false statements that were intentionally made or were made with a reckless disregard for the truth, (2) whether in the wake of excisions and supplementations required by Franks v. Delaware, the warrant could still be regarded as having set forth probable cause, (3) whether the Judge that issued the warrant was misled by these false and/or reckless statements, and (4) whether the State justified its failure to return non-contraband property seized outside the ambit of the warrant and which could not otherwise be regarded as having been seized for its evidentiary worth.

Here, of course, the critical point being made is that the practical effect of the trial court's failure and refusal to state his essential findings is that it has so far effectively frustrated this petitioner's right to due process. Indeed, at the appellate level, the Court there seized upon the trial court's failure to articulate his essential findings as a license to attribute to the trial court imagined or fanciful reasons

for his decision. Indeed this gross flaw in the trial judge's conclusory denial of the Motion to Suppress was actually tortured by the appellate court into being merely questions of law that were inferentially said to have been resolved by the trial court on that basis. This remarkable conclusion was then punctuated with the patently faulty assertion, especially when made in the context of this case, that such findings need not be set forth by the trial judge -- a truly sagacious ruling.

Here too, we emphatically note that whether the affidavit contained false statements that were intentionally made, or were made with a reckless disregard for the truth, the required resolutions can hardly be regarded as simply questions of law. Also, the question as to whether there were intentional omissions that could have had some impact on the essential question of probable cause can only be said to have been a "question of law" by one bent on reaching that conclusion for whatever reason. Also, whether the Judge was misled by the false statements and intentional

omissions simply does not come off as being anything other than a question of fact.

Stated another way, in the wake of the above questions (and this would be so in our judgment even if what was involved here were strict questions of law, which they are not), in this case it was still essentially, indeed absolutely, the duty of the trial court to make the appropriate findings of fact. And these, the Rules required he should put on the Record. Even this is not all, for what it is worth, Rule 12 (e) can be read as requiring the trial court to set forth his legal findings as well.

What emphasizes the criticality of correctly defining the type and nature of the questions actually resolved (either, implicitly or explicitly) by the trial judge is that such controls the standard that must be used by a reviewing court.

Also, and this point is of no mean significance, even if we could view the questions raised in the wake of the Motion To Suppress and the Evidentiary Hearing as being mixed questions of law and fact, the applicable standard for

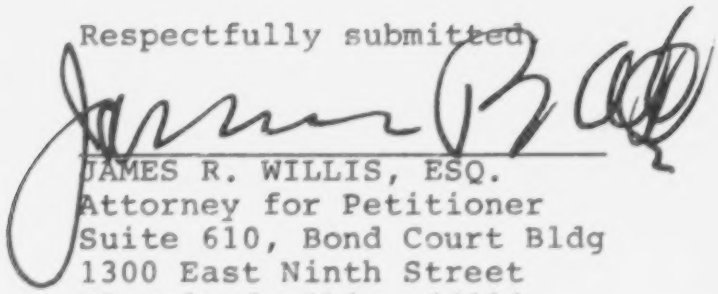
review would still be an "essentially factual" inquiry. This follows because the critical findings would in certain instances be concerned with the affiant's intent with reference to the wilful inclusions of the false material in his affidavit and with reference to his wilful omissions of material that should have been included. The same would be true of the issue as to whether the court that issued the warrant was misled. See, e.g., Pullman-Standard v. Swint, 456 U.S. 273 at 288-289 (1982).

What emerges from the above analysis is that the conclusions of the Court of Appeals to the contrary, notwithstanding, any inferences drawn from a trial court's summary ruling depends on the credibility of the witnesses, or the persuasiveness of the evidence considered by the Judge, in such instances, and can only be said to have been "findings of fact". This being so, to the same extent the Court of Appeals would label the "findings" it would impute to the trial judge in this case as being conclusions of law, their views simply cannot be credited as anything other than nonsense.

CONCLUSION

For all of the above reasons, the Petition prayed for should be granted.

Respectfully submitted,



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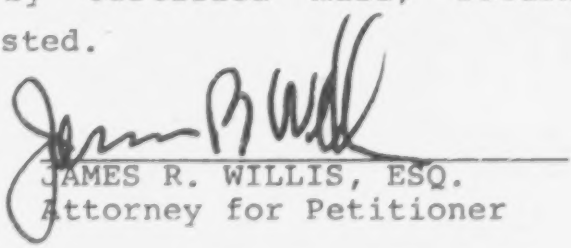
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ of Certiorari was mailed to the office of John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this 19th day of May, 1986, by certified mail, return receipt requested.



JAMES R. WILLIS, ESQ.
Attorney for Petitioner

A P P E N D I X

THE SUPREME COURT OF OHIO
COLUMBUS

1986 TERM

To wit: March 12, 1986

State of Ohio, :
Appellee, : Case No. 85-1963

v. : E N T R Y

Isaac Johnson, :
Appellant. :

Upon consideration of the motion for leave to appeal from the Court of Appeals for Cuyahoga County, and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by James R. Willis.

FRANK D. CELEBREZZE
Chief Justice

APPENDIX "A"

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 49812

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JOURNAL ENTRY
	:	and
ISAAC JOHNSON	:	OPINION
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION: DECEMBER 5, 1985

CHARACTER OF PROCEEDING: Criminal appeal from Common Pleas Court Case No. CR-188,477

JUDGMENT: Affirmed

DATE OF JOURNALIZATION:

APPEARANCES:

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APPENDIX "B"

PARRINO, C.J.:

Defendant Isaac Johnson appeals the trial court's denial of his motion to suppress evidence. For the reasons discussed below, the trial court's judgment is affirmed.

I.

The facts relevant to this appeal are as follows. On December 2, 1983 Mary Stewart was arrested for shoplifting by the Cleveland Heights Police Department. While in the Cleveland Heights jail, Stewart agreed to set up a drug buy with the defendant in exchange for her release.

Pursuant to that agreement, Stewart called Johnson and allegedly set up a drug buy. (The phone call was taped). Stewart was then strip-searched by Officer Donna Long and a recording device was taped to her body. She was also

given $200 to make the drug buy. Next, Stewart directed the police to Johnson's residence, and while the police watched from the car and monitored her conversations, Stewart went into the house. Approximately twenty minutes later, Stewart exited the house with a white substance later identified as cocaine, and allegedly without the $200. Stewart was taken back to the police station where she was again strip-searched and nothing else was found.

In light of this activity, Detective Pillar submitted an affidavit for a search warrant. Pillar's affidavit described with particularity the residence to be searched, and the contraband believed to be in the home. Pillar, in his affidavit, then proceeded to articulate the facts upon which he based his belief that contraband was located in the

home. More specifically, Pillar related the facts of the drug purchase by Mary Stewart, as discussed earlier. Pillar further alleged in his affidavit that the defendant's home was under surveillance for about three hours after the drug buy. During that time, five automobiles pulled into the defendant's driveway with the drivers entering the residence for a period of less than three minutes. Also, during that time, a man fitting the description of the defendant left the defendant's residence, drove to another home, entered for a few minutes and left with a package. That individual then returned to the defendant's residence. Pillar further alleged, based on his seventeen years of experience as a police officer, that this type of activity is consistent with drug sales.

Based on the aforementioned

affidavit, the trial court issued a search warrant for the defendant's residence located at 16189 Northvale Boulevard, East Cleveland, Ohio. A search was conducted on December 3, 1983, at which time various items were seized, including a loaded gun, master number sheets and money.

On January 24, 1984 Isaac Johnson was indicted on one count of possessing criminal tools in violation of R.C. 2923.24; one count of having a weapon while under disability in violation of R.C. 2923.13; and one count of violating R.C. 2925.03, i.e., selling a controlled substance in an amount less than the minimum bulk amount.

On February 22, 1984 the defendant filed a "motion to suppress and for the return of illegally seized property." A hearing on the motion took place on

May 2, 1984 and May 3, 1984. At the hearing Mary Stewart took the stand and testified that she had not had contact with Detective Pillar until the date of the alleged drug buy. She further testified that there was no drug buy, that she had simply faked the drug buy with defendant Johnson to gain her release from prison. Stewart stated that she had "fooled" the police by placing cocaine in her vagina prior to the alleged buy. She then went into Johnson's home, had a short discussion, and before leaving removed the cocaine from her vagina and replaced it with the two hundred dollars the police had given her. She also stated that she had not been searched by the police. Defendant Johnson also took the stand and testified that on the evening of December 2, 1983, people were not coming to his home, staying for a

matter of minutes, and then leaving.

Following this testimony, the defendant's attorney argued that Stewart and Johnson had established that Pillar's affidavit was riddled with misinformation, and thus, the evidence seized should be suppressed. On May 29, 1984 the defendant's motion to suppress was overruled by the trial court.

On December 20, 1984, the defendant entered a plea of no contest to all three counts as charged in the indictment. The trial court found the defendant guilty of having a weapon while under a disability, R.C. 2923.13 and possessing criminal tools, R.C. 2923.24. The trial court found the defendant not guilty of trafficking in drugs, R.C. 2925.03. On December 27, 1984 the defendant was sentenced to a term of two to five years on each of the two convictions.

The defendant has filed a timely appeal raising two assignments of error.

II.

First assignment of error:

> The Court erred in denying the pre-trial Motion to Suppress illegally seized evidence.

In support of this assignment the appellant makes two arguments. First the appellant maintains that the testimony at the suppression hearing established that Pillar had intentionally made misstatements and this alone was cause to suppress the evidence. Second, the appellant maintains that once the misstatements of facts are deleted from the affidavit, said affidavit did not establish probable cause, and thus the evidence should have been suppressed. These arguments are without merit.

Contrary to the appellant's asser-

tions, the testimony of Stewart and Johnson did not as matter of law establish that Pillar had made the numerous misstatements of facts. In Franks v. Delaware (1978), 438 U.S. 154, the court expressly stated that a warrant affidavit is presumed valid. Id. at 171. The court also held that if a hearing on the affidavit's veracity is had, the defendant has the burden of establishing by a preponderance of the evidence the allegation of perjury. Id. at 156. The trial court in the case sub judice, certainly would have been within its discretion to find that the defendant failed to maintain his burden. The credibility of both witnesses must be seriously questioned. Mary Stewart's testimony contradicts an earlier sworn statement, and Johnson's testimony is simply self-serving. Thus, this court

is not convinced that the appellate did in fact establish that there were several misstatements of fact in Pillar's affidavit.

Even if the appellant had established that some misstatements of fact did exist in the affidavit, he is incorrect when he states that these misstatements alone, warrant the suppression of evidence. The appellant's contention that United States v. Leon (1984), 104 S.Ct. 3405, stands for such a proposition was expressly rejected by this court in State v. Hunt (Nov. 15, 1984), Cuyahoga App. No. 47941, unreported. In Hunt, this court stated as follows:

> While we recognize that the United States Supreme Court recently stated in United States v. Leon (1984), 104 S.Ct. 3405, 3423, that "suppression is appropriate . . . if the officers were reckless in preparing their affidavit," we find nothing

> in Leon which indicates that the Supreme Court intended to modify or abandon the standards enounced in Franks v. Delaware (1978), 438 U.S. 154. In fact, the Supreme Court cited Franks with approval in Leon. Id. at 2.

Further, we do not agree with the appellant when he asserts that we incorrectly interpreted the law in Hunt.

In alleging that the Hunt decision was erroneously decided, the appellant maintains that this court 1) failed to credit the importance of the magistrate's role in the warrant process; 2) forgot that under Illinois v. Gates the reliability of the informant is very relevant, and 3) failed to factor in the compelling idea that only true information should be put into the affidavit. These contentions are without merit. Also, this court has not found, and the appellant has not cited, a single case suggesting

that Franks was overruled by Leon or that Leon created a separate and distinct reason to suppress evidence. Accordingly, this argument is overruled.

The appellant's second argument is that absent the claimed misstatements the remaining contents of the affidavit lacked probable cause sufficient to support a search warrant. This argument is also without merit. Assuming, arguendo, that certain misstatements were made in the affidavit, this court must determine whether, after excision of the false matter, the affidavit is left with sufficient content to establish probable cause. Franks v. Delaware (1978), 438 U.S. 154, 156; State v. Hunt, supra.

In Illinois v. Gates (1983), 103 S.Ct. 2317, the United States Supreme Court set forth the proper test in examining the sufficiency of a warrant

affidavit. In abandoning the "two-pronged" test in favor of a "totality of the circumstances" approach, the court held as follows:

> . . . we concluded that it is wiser to abandon the "two-pronged test" established by our decisions in Aguilar and Spinelli. In its place we reaffirm the totality of the circumtances analysis that traditionally has informed probable cause determinations . . . . The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth, in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . concluding" that probable cause existed. Id at 2332.

Reviewing the affidavit in light of the "totality of circumstances" approach and excising all points of disagreement between Pillar's affidavit and Stewart and Johnson's testimony, [1] we hold that probable cause existed in the affidavit to issue a search warrant.

The undisputed facts in the record include the following:

1) While in jail Stewart set up a drug buy with the defendant in exchange for her release;

2) Stewart called Johnson and set up the drug buy (the call was recorded);

3) Stewart was given two hundred dollars to make the purchase;

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1 Since it is not clear from the record which facts the trial court chose to believe, we will assume the trial court made its decision based on the undisputed facts in the affidavit.

4) A recording device was placed on Stewart's back;

5) Stewart directed the police to Johnson's home;

6) Stewart entered the home and in a monitored conversation a male said that he had "coke";

7) After approximately twenty minutes Stewart came out of the house with a bag of cocaine and apparently without the two hundred dollars;

8) Stewart was immediately taken back to the police station where she made a statement relating to the events of the drug buy,

Based solely on these undisputed facts, the trial court was within its discretion in determining that there was a fair probability that contraband would be found in the home. The fact that Stewart later testified that she had

"fooled" the police by pretending to make a drug buy does not render the search invalid. At the time the affidavit was completed the facts available clearly indicated that a drug buy had taken place. The defendant offered no evidence suggesting that the police knew otherwise. Accordingly, appellant's second argument is without merit.

Second assignment of error:

> The defendant was denied due process when the trial court refused to state his essential findings on the record.

The appellant argues that Crim. R. 12(E) requires the trial court to put its "essential findings on the record" as they pertain to the court's determination of the motion to suppress. This court has expressly held, however, that Crim. R. 12(E) does not require the court to state its findings on the

record if the decision involved a question of law. See City of Solon v. Mallion (1983), 10 Ohio App. 3d 130; State v. Elkins (April 5, 1984), Cuyahoga App. No. 47319, unreported. As noted earlier, the determination that the motion to suppress should be denied could be made as a matter of law. Therefore, the trial court was not required to state its findings on the record.

Appellant's second assignment of error is overruled.

IV.

The judgment is affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail

pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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CHIEF JUSTICE
THOMAS J. PARRINO

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.